

Information Management: Records
Management

The Department of the Army Freedom of Information Act Program

Headquarters
Department of the Army
Washington, DC
1 November 1997

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available or published may be relied upon, used or cited as precedent against any individual unless such individual has actual and timely notice of the contents of such materials. Such materials issued, promulgated, or adopted before July 4, 1967, need not be indexed, but must be made available upon request if not exempted under this regulation.

b. Each DoD Component shall promptly publish quarterly or more frequently, and distribute, by sale or otherwise, copies of each index of "(a)(2)" materials or supplements thereto unless it publishes in the Federal Register an order containing a determination that publication is unnecessary and impracticable. A copy of each index or supplement not published shall be provided to a requester at a cost not to exceed the direct cost of duplication as set forth in Chapter VI of this regulation.

c. Each index of "(a)(2)" materials or supplement thereto shall be arranged topically or by descriptive words rather than by case name or numbering system so that members of the public can readily locate material. Case name and numbering arrangements, however, may also be included for DoD Component convenience.

2-201. Other Materials

a. Any available index of DoD Component material published in the Federal Register, such as material required to be published by Section 552(a)(1) of the FOIA, shall be made available in DoD Component FOIA reading rooms. Army "(a)(2)" materials are published in DA Pam 25-30.

b. Although not required to be made available in response to FOIA requests or made available in FOIA Public Reading Rooms, "(a)(1)" materials shall, when feasible, be made available in FOIA public reading rooms for inspection and copying. Examples of "(a)(1)" materials are: descriptions of an agency's central and field organization, and to the extent they affect the public, rules of procedures, descriptions of forms available, instruction as to the scope and contents of papers, reports, or examinations, and any amendment, revision, or report of the aforementioned.

Chapter III Exemptions

Section 1 General Provisions

3-100. General

Records that meet the exemption criteria in Section 2 of this chapter may be withheld from public disclosure and need not be published in the Federal Register, made available in a library reading room, or provided in response to a FOIA request.

3-101. Jeopardy of Government Interest

An exempted record, other than those being withheld pursuant to Exemptions 1, 3, or 6, shall be made available upon the request of any individual when, in the judgment of the releasing DoD Component or higher authority, no jeopardy to government interest would be served by release. It is appropriate for DoD Components to use their discretionary authority on a case-by-case basis in the release of given records. If a DoD Component determines that a record requested under the FOIA meets the Exemption 4 withholding criteria set forth in this regulation, the DoD Component shall not ordinarily exercise its discretionary power to release, absent circumstances in which a compelling public interest will be served by release of that record. Further guidance on this issue may be found at paragraphs 3-200, Number 4, and 5-207 of this regulation.

Section 2 Exemptions

3-200. FOIA Exemptions

The following types of records may be withheld by the IDA in

whole or in part from public disclosure under the FOIA, unless otherwise prescribed by law. A discretionary release (see also para 1-504) to one requester may preclude the withholding of the same record under a FOIA exemption if the record is subsequently requested by someone else. In applying exemptions, the identity of the requester and the purpose for which the record is sought are irrelevant with the exception that an exemption may not be invoked where the particular interest to be protected is the requester's privacy interest.

Number 1. Those properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under the criteria established by Executive Order and implemented by regulations, such as DoD 5200.1-R (Reference (h)). Although material is not classified at the time of the FOIA request, a classification review may be undertaken to determine whether the information should be classified. The procedures in paragraph 5-100c(4) apply. In addition this exemption shall be invoked when the following situations are apparent:

a. The fact of the existence or nonexistence of a record would itself reveal classified information. In this situation, Components shall neither confirm nor deny the existence or nonexistence of the record being requested. A refusal to confirm or deny response must be used consistently, not only when a record exists, but also when a "no record" response itself will disclose national security interest.

b. Information that concerns one or more of the classification categories established by Executive Order and DoD 5200.1-R (reference (h)) shall be classified if its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security.

Number 2. Those related solely to the internal personnel rules and practices of DoD or any of its Components. This exemption has two profiles, high b2 and low b2.

a. Records qualifying under high b2 are those containing or constituting statutes, release, regulations, orders, manuals, directives, and instructions the release of which would allow circumvention of these records thereby substantially hindering the effective performance of a significant function of the DoD. Examples include:

(1) Those operating rules, guidelines, and manuals for DoD investigators, inspectors, auditors, or examiners that must remain privileged in order for the DoD Component to fulfill a legal requirement.

(2) Personnel and other administrative matters, such as examination questions and answers used in training courses or in the determination of the qualification of candidates for employment, entrance on duty, advancement, or promotion.

(3) Computer software meeting the standards of paragraph 1-402c, the release of which would allow circumvention of statute or DoD rules, regulations, orders, directives, or instructions. In this situation, the use of the software must be closely examined to ensure a circumvention possibility exists.

b. Records qualifying under the low 2b profile are those that are trivial and housekeeping in nature for which there is no legitimate public interest or benefit to be gained by release, and it would constitute an administrative burden to process the request in order to disclose these records. Examples include: rules of personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave and trivial administrative data such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communications, and other like administrative markings.

c. Negotiation and bargaining techniques, practices, and limitations.

Number 3. Those concerning matters that a statute specifically exempts from disclosure by terms that permit no discretion on the issue, or in accordance with criteria established by that statute for withholding or referring to particular types of matters to be withheld. Examples of statutes are:

a. National Security Agency Information Exemption, P.L. 86-36, Section 6 (reference (c)).

b. Patent Secrecy, 35 USC 181-188 (reference (i)). Any records containing information relating to inventions that are the subject of

patent applications on which Patent Secrecy Orders have been issued.

c. Restricted Data and Formerly Restricted Data, 42 USC 2162 (reference (j)).

d. Communication Intelligence, 18 USC 798 (reference (k)).

e. Authority to Withhold From Public Disclosure Certain Technical Data, 10 USC 130 and DoD Directive 5230.25 (reference (w) and (aa)).

f. Confidentiality of Medical Quality Records: Qualified Immunity Participants, 10 USC 1102 (reference (cc)).

g. Physical Protection of Special Nuclear Material: Limitation on Dissemination of Unclassified Information, 10 USC 128 (reference (aj))

h. Protection of Intelligence Sources and Methods, 50 USC 403(d)(3).

Number 4. Those containing trade secrets or commercial or financial information that a DoD Component receives from a person or organization outside the Government with the understanding that the information or record will be retained on a privileged or confidential basis in accordance with the customary handling of such records. Records within the exemption must contain trade secrets, or commercial or financial records, the disclosure of which is likely to cause substantial harm to the competitive position of the source providing the information; impair the Government's ability to obtain necessary information in the future; or impair some other legitimate government interest. Examples include records that contain:

a. Commercial or financial information received in confidence in connection with loans, bids, contracts, or proposals, as well as other information received in confidence or privileged, such as trade secrets, inventions, discoveries, or other proprietary data. (See para 1-100(ak)).

b. Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures, if offered and received in confidence from a contractor or potential contractor.

c. Personal statements given in the course of inspections, investigations, or audits, when such statements are received in confidence from the individual and retained in confidence because they reveal trade secrets or commercial or financial information normally considered confidential or privileged.

d. Financial data provided in confidence by private employers in connection with locality wage surveys that are used to fix and adjust pay schedules applicable to the prevailing wage rate of employees within the Department of Defense.

e. Scientific and manufacturing processes or developments concerning technical or scientific data or other information submitted with an application for a research grant, or with a report while research is in progress.

f. Technical or scientific data developed by a contractor or subcontractor exclusively at private expense, and technical or scientific data developed in part with Federal funds and in part at private expense, wherein the contractor or subcontractor has retained legitimate proprietary interests in such data in accordance with 10 USC 2320-2321 and DoD Federal Acquisition Regulation Supplement (DFARS), Subpart 227.4 (references (aa) and (ac)). Technical data developed exclusively with Federal funds may be withheld under Exemption Number 3 if it meets the criteria of 10 USC 130 and DoD Directive 5230.25 (reference (v))(see subpara 3-200, Number 3e).

g. Computer software meeting the conditions of paragraph 1-402c, which is copyrighted under the Copyright Act of 1976 (17 USC 106), the disclosure of which would have an adverse impact on the potential market value of a copyrighted work.

Number 5. Except as provided in paragraphs Number 5b through e, below, internal advice, recommendations, and subjective evaluations, as contrasted with factual matters, that are reflected in records pertaining to the decision-making process of an agency, whether within or among agencies (as defined in 5 USC 552(e) (reference (a)), or within or among DoD Components. Also exempted are

records pertaining to the attorney-client privilege and the attorney work-product privilege.

a. Examples include:

(1) The nonfactual portions of staff papers, to include after-action reports and situation reports containing staff evaluations, advice, opinions or suggestions.

(2) Advice, suggestions, or evaluations prepared on behalf of the Department of Defense by individual consultants or by boards, committees, councils, groups, panels, conferences, commissions, task forces, or other similar groups that are formed for the purpose of obtaining advice and recommendations.

(3) Those nonfactual portions of evaluations by DoD Component personnel of contractors and their products.

(4) Information of a speculative, tentative, or evaluative nature or such matters as proposed plans to procure, lease or otherwise acquire and dispose of materials, real estate, facilities or functions, when such information would provide undue or unfair competitive advantage to private personal interests or would impede legitimate Government functions.

(5) Trade secret or other confidential research development, or commercial information owned by the Government, where premature release is likely to affect the Government's negotiating position or other commercial interests.

(6) Records that are exchanged among agency personnel and within and among DoD Components or agencies as part of the preparation for anticipated administrative proceeding by an agency or litigation before any Federal, State, or military court, as well as records that qualify for the attorney-client privilege.

(7) Those portions of official reports of inspection, reports of the Inspector Generals, audits, investigations, or surveys pertaining to safety, security, or the internal management, administration, or operation of one or more DoD Components, when these records have traditionally been treated by the courts as privileged against disclosure in litigation.

(8) Computer software meeting the standards of paragraph 1-402c, which is deliberative in nature, the disclosure of which would inhibit or chill the decision making process. In this situation, the use of software must be closely examined to ensure its deliberative nature.

(9) Planning, programming, and budgetary information which is involved in the defense planning and resource allocation process (see reference (ak)).

b. If any such intra or interagency record or reasonably segregated portion of such record hypothetically would be made available routinely through the "discovery process" in the course of litigation with the agency, i.e., the process by which litigants obtain information from each other that is relevant to the issues in a trial or hearing, then it should not be withheld from the general public even though discovery has not been sought in actual litigation. If, however, the information hypothetically would only be made available through the discovery process by special order of the court based on the particular needs of a litigant, balanced against the interest of the agency in maintaining its confidentiality, then the record or document need not be made available under this Regulation. Consult with legal counsel to determine whether Exemption 5 material would be routinely made available through the discovery process.

c. Intra or interagency memoranda or letters that are factual, or those reasonably segregated portions that are factual, are routinely made available through "discovery," and shall be made available to a requester, unless the factual material is otherwise exempt from release, inextricably intertwined with the exempt information, so fragmented as to be uninformative, or so redundant of information already available to the requester as to provide no new substantive information.

d. A direction or order from a superior to a subordinate, though contained in an internal communication, generally cannot be withheld from a requester if it constitutes policy guidance or a decision, as distinguished from a discussion of preliminary matters or a request for information or advice that would compromise the decision-making process.